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NO. 81-2384

In The Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL LONGSHORE WORKERS, ILA LOCALS 1418 and 1419

Petitioners

v.

FALLON W. BENTZ, Acting Regional Director of the Fifteenth Region of the National Labor Relations Board,

Respondent

and

Great Southern, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the district court abuse its discretion when it ordered the distribution of royalty payments, paid into the court's registry pursuant to an order that modified an earlier temporary injunction order obtained under Section 10(*l*) of the Labor Management Relations Act pending the NLRB's determination that the royalties were violative of the Act, to those parties who bore this expense of the illegal payments?

PARTIES TO THE PROCEEDINGS BELOW

Fallon W. Bentz, Acting Regional Director, Region 15, National Labor Relations Board (Plaintiff in district court)

General Longshore Workers, ILA, Locals 1418 and 1419 (now merged—Local 3000) (Defendants in district court)

* * *

New Orleans Steamship Association (Intervenor in injunction proceedings, aligned with defendants)

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Panama City Port Authority Great Southern Paper Company International Navigation, Ltd. Central Gulf Lines, Inc. Alley & Alley, Chartered	(formal Intervenors into fund distribution proceedings to assert claims to portions of funds in court registry)

* * *

Sale, Bryant, Thompson & Kurvin Pioneer Shipping and Forward Company, Limited NOSSA-ILA Royalty Escrow Account Lykes Bros. Steamship Co., Inc. Combi Line Waterman Steamship Corporation	(additional claimants to portions of registry funds)

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PRELIMINARY STATEMENT

The petition for a writ of certiorari is to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming, *per curiam*, a judgment from the United States District Court for the Eastern District of Louisiana ordering repayment, to the victims, of monies exacted from them pursuant to the lighter royalty clauses of a collective bargaining agreement. The said clauses had been determined to be unlawful by the National Labor Relations Board (hereinafter "NLRB" or "the Board"). This opposition is filed on behalf of the four companies from whom most of the illegal royalty monies were exacted and to whom, consequently, most of the restitution was ordered made, namely: Central Gulf Lines, Inc. ("Central Gulf"), Great Southern Paper Company ("Great Southern"), International Navigation, Ltd. ("INL"), and Pioneer Shipping and Forwarding Company, Limited ("Pioneer").[1] The above listed companies were Intervenors-

[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Respondents represent the following entities are parent corporations, subsidiaries and affiliates of each Respondent:

a. Central Gulf Lines, Inc. is a wholly-owned subsidiary of International Shipholding Corporation.

b. International Navigation, Ltd. is a wholly-owned subsidiary of International Paper Company.

c. Great Southern Paper Company is a division (not separately incorporated) of Great Northern Nekoosa Corporation, a Maine corporation. The affiliates of Great Northern Nekoosa Corporation that are not wholly-owned, directly or indirectly, by that corporation are Envases Industriales de Costa Rica, S.A., incorporated in the Republic of Costa Rica, Industria Panamena de Papel,

Appellees in the proceedings below, are Respondents herein, and are sometimes referred to as the Fund-Claimant Respondents to distinguish them from the NLRB and other respondents.

COUNTERSTATEMENT OF THE CASE

The Fund-Claimant Respondents substantially accept Petitioners' Statement of the Case except to add the following, particularly with regard to the Unions' request for a modification of the district court's order enjoining collection of the royalty funds.

On March 15, 1976, the United States District Court temporarily enjoined the Unions from enforcing, with respect to cargo from Panama City, Florida, the lighter royalty clauses of a collective bargaining agreement pending a determination of the legality of the provisions by the

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(Footnote 1 continued)

S.A., incorporated in the Republic of Panama, and Leaf River Forest Products, Inc., a Delaware corporation, 95% owned by a wholly-owned subsidiary of Great Northern, and 5% owned by Kymi Kymmene Oy, a Finnish paper company.

d. Pioneer Shipping and Forwarding Company, Limited, is a wholly-owned subsidiary, the Altimate Holding Company being Reed International T.L.C., which is incorporated in the United Kingdom. Reed International T.L.C. has the following non-wholly-owned affiliates:

Compagnie Europeenne de Publication	(25% owned)
Tri-wall Container (Europa) BV	(50% owned)
Adshell Ltd.	(50% owned)
Industrial and Trade Fairs Holdings Ltd.	(40% owned)
Kings Reach Investments Ltd.	(39% owned)

NLRB. Following the court's injunctive order, the Unions and New Orleans Steamship Association ("NOSSA") made a request to have the royalty payments continue during the pendency of the litigation (on the merits of the unfair labor practice charges before the Board) and to have such payments paid into the court's registry in lieu of an injunction (R. 103, 112).

Subsequently, on June 28, 1976, the court ordered that collection of the royalties not be enjoined, but, instead that all funds derived therefrom be deposited in the registry of the court pending final determination of the merits by the Board. In modifying the injunction, the court reasoned that a registry fund appeared "to be the most equitable means to maintain the status quo pending final determination by the Board." (Petitioners' Appendix F at 18a).

Petitioners would have this Court believe that the district court's modification sanctioned a disbursement of the registry funds to the Unions, regardless of whether or not the Unions prevailed on the merits before the NLRB. The clear intent of all parties, reflected by the memoranda to Judge West in support of the modification, was that the registry fund monies could be available to the Unions *if and only if* they prevailed before the Board on the issue of whether the royalty provision was legal. Otherwise, the very act of obtaining a temporary injunction would have been superfluous, and there would have been no need for a registry fund. The Unions urged as much in their April 26, 1976 memorandum proposing a modified order:

> In order to protect the interest of the employees for whose benefit the royalty is collected, it is necessary to put the money royalty on the side. In the event the Unions prevail the money would be immediately available for distribution in accordance with the Collective Bargaining Agreement. If the Unions do not prevail, the *money can be returned with interest to those who have paid it.* Everyone is protected and there can be no chance of injustice. (emphasis added).

(Petitioners' Appendix E at 15a).

Petitioners' brief to this Court contends the Unions "prevailed" before the NLRB on the "crucial issue of reimbursement" (Petition for Writ at 5, n. 6), therefore the funds, illegally exacted from the fund contributors, should now be given to the Union. Petitioners' assertion is based on a footnote of the Administrative Law Judge's ("ALJ") opinion regarding a reimbursement request:

> The General Counsel requests an affirmative order requiring reimbursement to the "original payor" of money paid as royalties pursuant to the lighter royalty provision of the NOSSA-ILA contract. The "original payor", I take it, refers to the stevedoring and shipping companies who were liable for such payments under the contract which NOSSA executed on their behalf with Respondents. As the royalties paid by these employers were not involuntarily exacted from them by unlawful means but were sanctioned by the contract to which they voluntarily agreed, I deem it inappropriate to grant the General Counsel's request. See, *International Union of Operating Engineers, Local Union No. 12 (Acco*

> *Construction Equipment Co.*), 204 NLRB 742, note 3 (1973). A similar request for reimbursement of royalties made by the Charging Party is likewise denied.

Petitioners clearly misconstrue the intent of this footnote. It cannot be referred to in isolation, but must be interpreted in light of the entire decision to properly understand both its import and limitations. The ALJ's recommended decision ordered the Unions "...to cease and desist from maintaining, enforcing or giving effect to the lighter royalty provision..." (R.173). The ALJ further found that prior to the district court order establishing the registry fund "...lighter royalties of $2 a long ton ha[d] been paid pursuant to the lighter royalty clause on over 100,000 tons of cargo emanating from the Port of Panama City..." (R. 163, reverse side). The decision was adopted *in toto* by the Board. As clarified by the Board's attorney before the Fifth Circuit, the ALJ made no disposition whatsoever with respect to the funds in the court registry, but instead declined to order reimbursement of only those funds paid to the Unions prior to issuance of the temporary injunction order of March 15, 1976, and not deposited in the district court registry pursuant to the June 28, 1976 order.

> In short, the Board viewed the unfair labor practices as having terminated with the issuance of the Section 10(*l*) injunction and, in fashioning appropriate relief, the Board did not have occasion to consider the disposition of the substantial sum of monies accumulated in the escrow during the litigation.

(Fifth Circuit Brief for Petitioner-Appellee, NLRB, at 20).

With minor exceptions,[2] not essential to decision on the writ petition, Respondents accept the remainder of Petitioners' Statement of the Case regarding proceedings in the district court. It should be noted that the Fifth Circuit's *per curiam* affirmance without written opinion was not rendered pursuant to that court's summary calendar procedure, but instead was issued only after full oral argument.

REASONS FOR DENYING THE WRIT

The Issue Presented For Review Is Without Merit Since There Is No Conflict Between Either The District Court's Distribution Order And The Board's Order Or The Policies Of The Labor Management Relations Act.

Petitioners' brief assumes the NLRB had custody of and jurisdiction over the lower court's registry funds. This is clearly erroneous.

The NLRB, in its unfair labor practice proceeding, did not ever consider it had jurisdiction over the monies collected by the district court. As stated by the Board's attorneys to the Fifth Circuit, "...the Board did not have occasion, in fashioning a remedy, to consider the $1.1 million paid into escrow after the Section 10(*l*) injunction issued..." because "...the Board only found violations in

[2] *E.g.*, contrary to the statement on page 4 of the petition for writ, the funds in the court's registry earned no interest at all until on or about September 27, 1978, and drew only 5¼% interest thereafter until about December 13, 1979, when the major portion of the monies was first invested in treasury bills.

connection with the Union's enforcement of the royalty provisions during the period from about October 1, 1974...until the district court's order...in the 10(*l*) injunction proceeding." (Fifth Circuit Brief for Petitioner-Appellee, NLRB at 20). In other words, the Board only exercised jurisdiction over those monies collected prior to the issuance of the temporary injunction order on March 15, 1976, since it considered the unfair labor practices as having terminated with the March 15 issuance of the Section 10(*l*) injunction.

Further, any effort by the Board to exert jurisdiction over the registry fund would have been futile, because the fund is clearly within the exclusive jurisdiction of the district court. The status of property held by a federal court is within that court's exclusive jurisdiction "...so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property." *Mid-Jersey National Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643 (3rd Cir. 1975), citing *United States v. Klein*, 303 U.S. 276, 281 (1938). The federal court ordering creation of the funds is responsible for its distribution and not an Administrative Law Judge, as suggested by Petitioners. The distribution is an equitable proceeding within the exclusive jurisdiction, expertise and discretion of the federal court. The lower court stated as much in its *Reasons for Judgment* and *Order* (Petitioners' Appendix E at 16a):

The Unions and NOSSA argue that the funds

should be returned to the NOSSA-ILA Pension Fund as called for by the collective bargaining agreement. Such a result would, in the opinion of this Court, defeat the purpose of Judge West's order that the funds be deposited in the court's registry. As indicated above, that order was in response to urgings of NOSSA and the Unions. It was an exercise of the court's equitable powers to protect the interests of all parties, pending the Board's adjudication. And, as can be seen from the quoted portions of the briefs of NOSSA and the Unions, those parties asserted that in the event the Board found the royalty unlawful, the funds should be returned to those who paid them.[3] Equity demands nothing less. It is contended that the Board had the issue of "reimbursement" before it and decided not to grant such relief. That contention is based on a footnote

[3] Both NOSSA and the Unions argued for the creation of a registry fund citing relief in the way of an equitable disbursement to the payors should the fund be found unlawful. NOSSA's motion in support of a registry fund included the following argument (See Petitioners' Appendix E at 15a):

> Conversely, the continuance of royalty payments during the pendency of this litigation, conditioned upon an escrow of the royalty sums in the Registry of Court or as otherwise directed by this Court, would result in no injury to the charging parties since the sums of money paid monthly would all be available to those charging parties at the end of this litigation should the result be favorable to the NLRB.

The Unions put forth the same argument in different language in their April 26, 1976 memorandum:

> In order to protect the interest of the employees for whose benefit the royalty is collected, it is necessary to put the money royalty on the side. In the event the Unions prevail the money would be immediately available for distribution in accordance with the Collective Bargaining Agreement. If the Unions do not prevail, the money can be returned with interst to those who have paid it. Everyone is protected and there can be no chance of injustice.

> in Administrative Law Judge Leff's opinion. Whatever might be the result if the Administrative Law Judge's footnote concerning "reimbursement" were construed in any other way, the court does not construe it as applicable to the funds deposited in the registry of the court and thus gives it no effect with respect to the issues now before the court.

Funds held by the court *in custodia legis* are considered as the *res* of a trust. "The court acts as trustee and is charged with the duty of determining the beneficiaries..." *Mid-Jersey, supra*, 518 F.2d at 643. Further, the disposition of an equitable fund is entirely within the discretion of the court that created it and can only be reversed for an abuse of that discretion. *Willametz v. Susi*, 489 F.2d 364, 366 (1st Cir. 1973).

The court below ordered an equitable distribution of the funds to "those who incurred the unlawful expense" (*Reasons for Judgment*, Petitioners' Appendix E at 17a). The court's return of the monies to the contributors was clearly within its equitable discretion and not an abuse of power.

The actions of the district court are not in conflict with *Sears, Roebuck & Co. v. Carpet, Linoleum, Soft Tile Layers, Local 419*, 397 U.S. 655, *reh'g denied*, 399 U.S. 917 (1970), as suggested by Petitioners. The 10(*l*) injunction proceeding, commenced by the Acting Regional Director of the NLRB, sought and was properly limited to a protection

of the "public interest" as required by *Sears*. The Fund-Claimant Respondents did not attempt to intervene (and could not properly have intervened) on the merits of injunctive relief.

The injunction terminated *by operation of law* (See, *Sears, Roebuck*, 397 U.S. at 658-659), in 1978 when the NLRB issued its Decision and Order striking down the lighter royalty exactions as unlawful. All that remained for the trial court after termination of the 10(*l*) injunction was the purely ministerial duty, after the Board order became final, of dissolving the injunction.

The creation of the registry fund commenced what may be considered in effect to be a distinct secondary proceeding, not directly a portion of, but ancillary to the Section 10(*l*) injunction proceeding. The registry fund proceeding began when Judge West exercised his general equitable powers to convert his original injunction, against payment of the lighter royalties to the Unions, into an order that the royalties continue to be collected and held in the registry of the court to preserve the *status quo* pending final Board determination.

The registry fund proceeding survived the "by operation of law" termination of the 10(*l*) injunction because the district court, having drawn the monies into its custody and control, retained jurisdiction over distribution of the funds. It is not until the litigation reached this point that the Fund-Claimant Respondents intervened in

the ancillary proceeding to assert an interest in the registry fund.

> It is settled that where, in the progress of a suit in federal court, property has been drawn into the court's custody and control, third persons claiming interest in or liens upon the property might be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene pro interesse suo, or by dependent bill. But, in either case, the proceeding was purely ancillary.

Hoffman v. McClelland, 264 U.S. 552, 558 (1924).

The ancillary proceeding was not one in which any "relief" under Section 10(*l*) was sought or obtained. By the time of intervention there was no longer a question of a "public interest" for the Board to protect. That had already been resolved. The only question remaining was a determination of the purely private rights of the parties laying claim to the monies. These rights could be and were decided by the district court without any impingement whatsoever upon the jurisdiction, authority or remedial powers of the NLRB.

The trial court acted within its own general equitable

power and responsibility to decide ownership of a fund the court had, by its order, created. This equitable power is recognized by statute. The deposit and withdrawal of monies paid into a registry fund is governed by the provisions of 28 U.S.C. §§2041 and 2042. Section 2042 provides that any claimant entitled to money in the fund has a right to petition the court for an order directing payment to him upon proof of the right thereto.

Just as the NLRB's jurisdiction should be protected against encroachment by courts, no impingement should be permitted upon the district court's right to exercise exclusive power over a judicially created fund—a power clearly recognized by the Board to be beyond that agency's sphere. Petitioners should not be allowed to disturb this established and appropriate balance of power between the courts and federal agencies.

The district court, vested with exclusive jurisdiction over the equitably-created fund—jurisdiction the NLRB disclaims—was clearly within its discretion in ordering disbursement to those parties who bore the expense of the illegal payments. Accordingly, since there is no conflict between the district court's distribution order and the powers of the NLRB or the policies of the Act, there is no substantial federal question to be decided and this Court should deny the petition for a writ of certiorari in this case.

There Is No Closely Related Case Pending Before This Court.

Petitioners claim a writ should issue herein so that this case may be considered simultaneously with *Shepard v. NLRB*, __ U.S. __, No. 81-1627, 50 U.S.L.W. 3908 (May 18, 1982), in which a writ was granted on May 17, 1982. Petitioners contend the cases warrant simultaneous consideration because the identical question raised by *Shepard* was decided by the Board in adjudicating the unfair labor practice charges in the instant case.

The only similarity between the cases is that the Board found certain agreements violative of Section 8(e) of the Act. The issues on review in each case are distinctly dissimilar. The issue in the instant case is not whether the Board abused its discretion, which is the issue in *Shepard*; rather, it is whether the district court abused its discretion in distributing monies held in its registry, in an escrow account created through its equitable powers.

In *Shepard*, the Board declined to order reimbursement to various companies for payment of Union expenses upon a finding that the "hot cargo" agreement requiring such payments violated Section 8(e) of the Labor Management Relations Act. That case involved the usual type of Section 10(*l*) injunction proceeding, in which no registry fund was created by a federal court; no challenge of the court action has been brought to this Court. It is only the exercise of the NLRB's discretion that is questioned in *Shepard*.

In the instant case, the issue is not whether there was an abuse of discretion by the Board in fashioning a remedy; the Board's decision was never appealed. Rather, the question at hand is the nature and extent of a federal court's jurisdiction over monies it impounded for equitable reasons.

Since the *Shepard* case does not involve an analogous situation, much less a closely related issue, there is no need, indeed no reason, to consider these cases simultaneously, or to consider this case at all.

CONCLUSION

For the above and foregoing reasons, it is respectfully urged that the petition for a writ of certiorari filed by the Petitioners, General Longshore Workers, ILA, Locals 1418 and 1419, should be denied.

Respectfully submitted,

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